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SUCCESSION OF COGNATES UNDER THE MITAKSHARA.

I.

The author of the Mitakshara opens section VI of Chapter II by stating that, in default of Gentiles, *i.e., Gotraja Sapindas* and *Samanodakas,* the *Bandhus* or cognate *Sapindas* are heirs and that such *Bandhus* are of three classes—*Atma-bandhus* (one's own cognate kindred), *Pitru-bandhus* (father's cognate kindred or cognate kindred through the father), *Matru-bandhus* (mother's cognate kindred or cognate kindred through the mother)—and cites the following text in support of this classification. :—

" The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."

There are altogether nine cognates specified in the text and divided into three classes, each class consisting of three. A man's (1) father's sister's sons, (2) mother's sister's sons, (3) mother's brother's sons are first named as being his *Atma-bandhus* or his own cognate kindred. His (1) father's father's sister's sons, (2) father's mother's sister's sons, (3) father's mother's brother's sons are then named as being his *Pitru-bandhus* or his father's cognate kindred. His (1) mother's father's sister's sons, (2) mother's mother's sister's sons, and (3) mother's mother's brother's sons are named last as his *Matru-bandhus* or his mother's cognate kindred.

There being nothing in the text itself expressly as to the succession or the relative rights of succession of these three classes of *Bandhus*, the author of the Mitakshara immediately after citing the text, which by some is ascribed to Vriddha Satatapa, by others to Baudhayana, comments upon it in placitum 2 as follows:—"Here by reason of mere affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." (1)

In each class three are mentioned who are respectively the first cousins of the propositus, of his father and of his mother. The author of the Mitakshara, while expressly stating the order of succession as between the three classes of *Bandhus*, is silent as to the order of succession *inter se* among the members of each class. The probability is that his silence is designed, inasmuch as the enumeration of *Bandhus* comprised in each class is not exhaustive, but illustrative. As already observed until about the time of the decision of the Privy Council(2) (June 1868,) and a Full Bench decision of the *Calcutta High Court* (3) which was delivered about the same time (September 1868,) the notion prevailing in the Indian Courts was that the said enumeration was exhaustive. But it is now the settled law that it is only illustrative and that any person, at any rate a male, who is within the definition of a *Bhinnagotra Sapinda* is entitled to succeed as such.

There may be no small difficulty in framing an exhaustive table of the *Bandhus* or *Bhinnagotra Sapindas* under the Mitakshara Law and in grouping them into the three classes and in settling the order of precedence *inter se* among the members of each class.

Mr. Mayne contrasts the difference between the Mitakshara and the Bengal School in respect of *Bandhus* and points out the radical difference between the two in paras. 461 to 473, 475, 535, 536 and 539. Under the Bengal School the spiritual benefit arising from the offering of oblations to the manes of the deceased's ancestors is the cornerstone of the law of Inheritance. Under the

(1) Stokes's Hindu Law Books, page 449.
(2) *Gridhari Lall Roy* v. *The Bengal Government*, 2 M. I. A., 448.
(3) *Amrita Kumari Debi* v. *Lakshinaryan Chuckerbutty*, 2 B. L. R. F. B., 28.

Mitakshara or Benares School, consanguinity or propinquity is the cornerstone of the law of Inheritance. No doubt in several cases, especially in the case of very close heirs and some of the remoter heirs, the person entitled to succeed by reason of consanguinity will also be the person who will confer the greatest spiritual benefit. Under the former the offering of funeral oblation is the cause of inheritance, and under the latter propinquity is the cause of inheritance, though in doubtful cases the offering of funeral oblations may be evidence of such propinquity.(1) The important thing to be borne in mind is that the author of the Mitakshara emphatically declares that the term heritage (*Daya*) signifies that wealth which becomes the property of another *solely by reason of relation to the owner*, and *he again declares* referring to the *text of Manu*,* "To the nearest *Sapinda* the inheritance next belongs," that the rule of propinquity is the governing principle not only in the case of *Sapindas* but *Samanodakas* and others when they appear to have a claim to the succession. That the conception of the *Sapinda* relationship by the author of the Mitakshara is founded solely upon consanguinity or community of particles of body and not upon the principle of religious efficacy resulting from the offering of funeral oblations is unequivocally declared in an earlier portion of his work, already referred to, which has not been translated by Mr. Colebrooke.

There in his exposition of the theory and definition of *Sapinda*, the author expressly *repudiates* the theory that *Sapindas* are persons connected by exequial *pindas* and maintains that they are consanguineous relations, *i.e.*, kinsmen of the deceased related by consanguinity.(2)

Mr. Colebrooke was unfortunately unaware of this portion of the Mitakshara, and being familiar with the Bengal School of Hindu Law, he naturally translated the word "*Sapinda*" wherever it occurred in the chapter relating to inheritance as persons "connected by funeral oblations." This, no doubt, was the reason why

(1) Mitakshara, ch. I, Sect. 1, § 2. Stokes's Hindu Law Books, page 364.
Tagore Law Lectures for 1880, by Rajkumar Sarvadhikari, pages 626 and 627.
Chapter II, Sect. 3, § 4. Stokes's Hindu Law Books, page 443.

(2) Tagore Law Lectures for 1880, by Rajkumar Sarvadhikari, pages 598 to 601, also Madras Law Journal, vol. I, part II, page 75, *Umaid Bahadur* v. *Udoi Chand*. I. L. R., 6 C., 119, at pp. 126, 127; *Lalubhai Surchand* v. *Bai Amrit*, I. L. R., 2 B., 300, at pp. 426 & 427.

* Manu, chapter IX, verse 187.

in the earlier administration of Hindu Law by British Courts and until light was thrown upon the matter by researches into the untranslated portions of the Mitakshara and some of the principal commentaries thereon, the fundamental notion of Inheritance under the Mitakshara was obscured and more or less lost sight of, and confounded with the Bengal theory of spiritual benefit on which the whole scheme of inheritance is based.(1)

The difference between the two schools produces the greatest divergence in regard to the succession of *Bandhus* or cognate *Sapindas*. Under the Mitakshara system, the cognate kindred with the exception of the daughter's son who is exceptionally brought in next after the daughter do not succeed until after all the agnate *Sapindas* and *Samanodakas* are exhausted. According to the definition, a man's ascendants in an unbroken male line up to the seventh degree and his descendants in an unbroken male line up to the seventh degree, he being included in counting the degrees in either case, are his agnate *Sapindas* in direct ascending and descending lines. The descendants up to the seventh degree in an unbroken male line of each one of such ascendants are his collateral agnate *Sapindas*. His lineal male ancestors beyond the seventh degree up to the fourteenth degree as well as his lineal male descendants below the seventh up to the fourteenth degree as well as the lineal male descendants up to the fourteenth degree of each one of such ascendants beyond the seventh up to the fourteenth degree are his lineal and collateral *Samanodakas* who are also agnates. It will be seen that all these are agnates and must be exhausted before the nearest *Bandhu* or cognate *Sapinda* can come in, except, of course, the daughter's son. According to the principle, already adverted to, of the transmission of corporeal particles to one's descendants, which forms the test of propinquity, such transmission in an unbroken male line among agnates is so efficacious that the most distant *Samanodaka* or an agnate who may be fourteen degrees removed from the propositus, or from the common ancestor of himself and the propositus, is regarded as nearer of kin than the nearest cognate; the reason being that in the latter case the community of corporeal particles is comparatively attenuated by the circumstance that the trans-

(1) Mayne on Hindu Law and Usage, 5th Edition, para. 469.
Tagore Law Lectures for 1883, by Dr. Jolly, page 168.
Lalubhai Surchand v. *Bai Amrit*, I. L. R., 2 B., pp. 430 and 431.

mission of particles through an unbroken male line is interrupted by the intervention of a male of quite a different family and *gotra*, but preserved, though in a comparatively attenuated degree, by such male having married a female descendant of the propositus within seven or five degrees as the case may be, according as the propositus may be in the paternal or maternal line of such descendant, or by his having married a female descendant of a common ancestor of the propositus and such descendant, such common ancestor being within seven or five degrees of the propositus, as the case may be, according as the common ancestor is in the paternal or maternal line of the propositus and such descendant being within seven or five degrees of the common ancestor as the case may be, according as such common ancestor may be in the paternal or in the maternal line of such descendant. Turning now to the Dayabhaga Law, the system of inheritance which is founded on the religious efficacy resulting from the presentation of the funeral oblations to the manes of the ancestors of the deceased is briefly as follows. The *gotraja* or agnate *Sapindas* of the Mitakshara are classed by Jimutavahana, the author of the Dayabhaga, as *Sapindas* and *Sakulyas*, the former being agnates within three degrees or nearer agnate *Sapindas*, the *Sakulyas* being the remoter agnate Sapindas beyond the third degree to the seventh degree. Under the Mitakshara system as already explained, both form one class, none being interposed except the daughter's son. But under the Bengal system the *Bandhus* are interposed both among the nearer agnate *Sapindas* and among the *Sakulyas* or the remoter agnate *Sapindas*; the result is that the *Bandhus* or cognates *are shuffled* in among the agnates instead of, as under the Mitakshara, coming after the agnates including *Samanodakas*(1) and not only do all the cognates come in before any of the *Sakulyas* or *Samanodakas* but the cognates themselves *are shifted in and out* among the nearer agnates, heirs in the female line frequently taking before very near *Sapindas* in the direct male line on the principle of superior religious efficacy.(2)

This system is made quite intelligible if we bear in mind that a Hindu (male) is bound to offer undivided oblations to his father, father's father, and father's father's father; to his mother's

(1) Mayne's Hindu Law and Usage, para. 9, page 8.

(2) Mayne's Hindu Law and Usage, para. 467, page 580.

father, mother's father's father and mother's father's father's father; and divided oblations to his three ancestors in the male line beyond the father's father's father and libations of water to the seven ancestors in the male line beyond the last of those to whom divided oblations are offered.

A deceased Hindu is spiritually benefited by the oblations which are offered to him. He is also benefited by the oblations which though not offered to him are offered to one to whom the deceased in his lifetime was bound to offer. The person who offers oblations confers greater benefit upon the receiver of such oblation than the latter by receiving such oblations confers upon the offerer. In other words the offering of an oblation to any individual constitutes a superior claim to acceptance of an oblation from him or the participation in oblations offered by him to another. The offering of undivided oblations is considered to be of higher spiritual value than the offering of divided ones and the divided oblations are considered to be superior to mere libations of water. Those who offer undivided oblations to both paternal and maternal ancestors are superior to those who offer only to the paternal ancestors.(1) Those who offer undivided oblations to the paternal ancestors of the deceased proprietor are superior to those who offer such oblations to his maternal ancestors only, so much so that one who offers oblations to only one of the paternal ancestors of the deceased is preferred to one who offers to more than one of the maternal ancestors of the deceased. Those who offer oblations of a particular description to a larger number of the deceased's ancestors are preferred to those who offer the same description of oblation to a less number of ancestors in the same line. By applying these principles the table of succession under the Dayabhaga will stand as shown in paras. 462 and 463 of Mayne on Hindu Law and Usage, 5th Edition, and the enumeration of *Bandhus* or cognates and their division into *ex-parte paterna* and *ex-parte materna* will be found exhaustively set forth in two tables, Nos. 1 and 2, appended to paras. 464 and 465 respectively of Mayne on Hindu Law and Usage. A table of succession under the Bengal School will also be found set forth in Tagore Law Lectures for 1883 by Rajkumar Sarvadhikari at page 864.

(1) Mayne's Hindu Law and Usage, para. 467, pp. 579—80.

On the principle of religious efficacy the first cognate who is brought in is the daughter's son and he comes next after the great-grandson, the widow and the daughter being interposed by reason of special texts in their favour and the daughter's son is given priority over such a close agnate as the brother. When we apply the principle of religious efficacy, the reason becomes obvious; the daughter's son offers oblations to the propositus himself and his father and paternal grandfather; the brother offers no oblations to the propositus, but he offers oblations to the very same three paternal and maternal ancestors to whom the deceased during his life-time was bound to offer; and therefore, the deceased only participates in the said oblations; and owing to the principle already indicated that the offering of any oblation to the deceased constitutes a superior claim to the offering of oblations to the ancestors of the deceased in which the deceased only participates, a daughter's son has priority over a brother. No doubt, under the Mitakshara also the daughter's son has the same priority over a brother. But that is not because of his conferring superior spiritual benefit, but because the author of the Mitakshara interprets the suffix *cha* (also) to the Sanskrit word *Duhitarah* (daughters) as including the "daughter's son."(1)

The next cognate who is brought in after the daughter's son is the sister's son who is placed next after the brother, brother's son and brother's grandson and before the grandfather and other agnates.

Under the Dayabhaga, the daughter's son, the father, the grandfather and the great-grandfather are brought in next after their respective descendants in the male line up to the third degree. Comparing the spiritual benefit conferred by the father's paternal aunt's sons, and that conferred by the maternal uncle the former has superiority over the latter. Both are cognates who offer undivided oblations. The former offers an undivided oblation to one of the paternal ancestors of the propositus, whereas the latter offers undivided oblations to the maternal ancestors of the propositus. Owing to the operation of one of the principles already referred to, *viz.*, that the offering of an undivided oblation to a paternal ancestor is superior to the offering of undivided oblations to a maternal

(1) Mitakshara, ch. II, section II, § 6. Stokes's H. L. B., page 441.

ancestor, the father's paternal aunt's sons are superior to the maternal uncle and his sons under the Dayabhaga School,(1) and both of them will come in before the remoter agnate *Sapindas, Sakulyas* and all *Samanodakas*, whereas under the Mitakshara neither of them will come in until after the *Samanodakas*.

In fact, cognates are divided into two classes, *viz.*, *ex-parte paterna* and *ex-parte materna.* And on the principle of religious efficacy the latter are postponed to the former.(2)

Under the Mitakshara the cognates, who are defined not with reference to religious efficacy but with reference to community of corporeal particles, are divided into three classes as already shown on the principle of the relative propinquity of such classes.

In addition to what has already been pointed out, another serious consequence of the radical difference between the two schools in respect of cognates is that so many as *four* out of the limited number of nine *Bandhus* specifically enumerated in the Mitakshara are not recognized as cognates by the Dayabhaga School for the obvious reason that they cannot possibly satisfy the religious test of Jimutavahana. They are the father's maternal uncle's son, the father's maternal aunt's son, the mother's maternal uncle's son and mother's maternal aunt's son being Nos. 14, 15, 21 and 22 in Mr. Mayne's table of *Bandhus* under the Mitakshara.(3)

It will also be observed that those cognates find no place, in either of Mr. Mayne's tables of *Bandhus* under the Dayabhaga Law, *viz., ex-parte paterna* and *ex-parte materna.*(4)

For the sake of illustration, let us consider the case of the father's maternal uncle's son. The common ancestor of these two (*viz.*, the propositus and his father's maternal uncle's son) is the owner's father's mother's father to whom according to the rule already indicated the owner offers no kind of oblation, though his father's maternal uncle's son offers undivided oblations to such common ancestor being his father's father. But under the Mitakshara definition of *Sapinda* the two are cognate kindred. Nothing there-

(1) Dayabhaga, Ch. XI, Sec. VI, S. 12. Stokes's H. L. B., page 346.

(2) Mayne's Hindu Law and Usage, para. 464.

(3) Mayne's Hindu Law and Usage, page 667.

(4) *Ibid.*, pp. 574 and 577.

fore, is more fallacious and misleading than the application of the Bengal Law in determining under the Mitakshara Law the status of a claimant as a cognate, or his relative position to another cognate. Even if the Mitakshara were obscure or silent on the point, bearing in mind the radical difference between the two schools in regard to cognates, it will be altogether unsafe and dangerous to be guided by the express texts or principles of the Dayabhaga School. But the difficulty will have to be solved as best it can, by relying on the Mitakshara definition and theory of *Sapindaship* and the cardinal principle of propinquity as determining the rule of succession. But when the author of the Mitakshara is express on the point and leaves no room for doubt, not only will an appeal to the Bengal School be unwarranted, but there is not even any necessity for unraveling the large body of unspecified *Bandhus* with reference to the Mitakshara definition of *Sapinda*, and constructing an exhaustive table of cognate kindred and dividing them into three classes on the analogy furnished by the illustrations given in Satatapa's text indicating the relative order of the cognates comprised in each class.

Mr. Mayne no doubt has attempted to construct what apparently purports to be an exhaustive table of *Bandhus* under the Mitakshara system indicating their relative order of precedence. As far as it goes it is in the main correct; but the table is by no means exhaustive either in the descending, ascending or collateral lines, comprising as it does only 27 *Bandhus*, among whom the maternal uncle and his sons rank as Nos. 8 and 9 respectively, and the father's paternal aunt's son ranks as No. 11.(1)

The original definition of *Sapinda* is contained in the chapter relating to marriage and it is that which has to be applied in the matter of inheritance. Mr. Mayne refers to this definition of *Sapinda* in his chapter on Marriage.(2) He there observes that according to that definition 2,121 possible relations are rendered ineligible for marriage. The clue to the said number is to be found in Mandlik's treatise on Hindu Law, Appendix No. 3, page 345; where he treats of *Sapinda* relationship in respect of marriage, impurity and inheritance. It will be remembered that the

(1) Mayne's Hindu Law and Usage, para. 667.

(2) Mayne's Hindu Law and Usage, para. 82.

definition refers to five degrees on the mother's side and seven degrees on the father's side. Hardly has any commentator or author on Hindu Law explained whether the maternal line mentioned in the definition refers to the agnate line of the mother's father alone, or includes the line of his mother also, as well as the mother's mother's paternal and maternal lines extending to the fifth degree from the propositus, and whether the paternal line mentioned in the same definition is the father's agnate paternal line only or includes the father's father's maternal line also, as well as the father's mother's paternal and maternal lines extending to the seventh degree from the propositus. If this question is solved, there will be no difficulty in constructing an exhaustive table of cognate kindred. Mr. Mandlik has constructed four short tables illustrating the *Sapinda* relationship for purposes of marriage at pages 349, 350 and 351, of his treatise on Hindu Law, and though he does not expressly allude to the above question in the exposition of *Sapinda* relationship, the table clearly shows that he understood the maternal as well as the paternal line as referring to the maternal and the paternal line of the mother and the paternal and the maternal lines of each of the ascendants in that line and the paternal and the maternal line of the father and the paternal and the maternal lines of each of the ascendants in that line. This certainly is in accord with the literal and the grammatical meaning of maternal and paternal; and bearing in mind that the cornerstone of the definition is consanguinity or blood relationship, the probability is that the literal meaning was intended and there is no reason for restricting the line to the agnate line of the mother's father or the agnate line of the father. The same will be applicable to the descending and collateral lines of cognates. By reason of a female becoming of the same *gotra* as her husband all the wives of agnates are also declared as agnate *Sapindas*. On referring to the said Table No. I (1) which is exhaustive of the paternal line, it will be seen that by dividing the line paternally and maternally in respect of each ancestor, whether a male or a female, up to seven degrees, there are thirty-two pairs of *Sapindas*, each pair consisting of husband and wife; and on referring to Table No. II, (2) assuming that each pair or stem has one son and one daughter and no more, and that each of his or her descendants up to the seventh degree has one son and one daughter, it

(1) Mandlik's Hindu Law, page 349. (2) Mandlik's Hindu Law, page 350.

will be seen that there are 63 male descendants and 63 female descendants under each pair or stem; or on the whole 2,205, of whom 1,102 are males and 1,103 are females and not as Mandlik puts it 2,016 males and 2,016 females as will be seen from the following:—

The persons mentioned in Table No. I excluding mother (who will be brought under the maternal line) are 63. Add to this number 32 the number of persons omitted in Table I being sister of the propositus and sisters of A to P and brothers of B′ to P′, *i.e.*, 32 + 63=95. Add again 1,984 or 32 × 62, *i.e.*, 62 decendants of each of the above 32 persons omitted in Table I, *i.e.*, 95 + 1,984=2,079. The figure 62 is arrived at thus. Every person has 126 descendants; 63 by his son and 63 by his daughter which son and daughter are brother and sister.(1) *Ex-hypothesi* in Table I the sister of the propositus and the sisters of A to P and brothers of B′ to P′ are omitted. Therefore, the descendants of each omitted sister or brother would be 63—1 (the sister or brother) *i.e.*, 62. To this number 2,079 add the number of descendants of the propositus, *viz.*, 126. The total number of paternal cognates—ascendants, collaterals and descendants included—will be 2,079 + 126 = 2,205. Mr. Mandlik's calculation is wrong because he has included the same set of persons twice over in his calculation; for, some of the descendants of each pair of ascendants will also necessarily be the descendants of the pair above it, as well as of that below. So also, some of the descendants of the propositus will be the descendants of some of the pair of his ascendants. Now passing on to the mother's side, Table No. III (2) which is exhaustive of the ascending lines of the mother exhibits eight pairs or stems, and excluding the first pair whose descendants have been included in the totals already arrived at, *viz.*, 2,205, and assuming that each pair or stem has one son and one daughter and that such son and daughter as well as each descendant of such son or daughter has one son and one daughter the number of *Sapindas* will be 120 of whom 60 are males and 60 females and not 105 males and 105 females as Mr. Mandlik calculates. The number 120 is arrived at thus:—Persons mentioned in his Table No. III excluding A already included under the paternal line are 15.

(1) Table No. 2 at page 350 of Mandlik's Hindu Law.

(2) Mandlik's Hindu Law, page 351.

To this add 7 persons omitted in Table No. III being sisters of B to D and brothers of A′ to D′, *i.e.*, 15 + 7 = 22. To this number 22 add the number of descendants of each of the above omitted 7 persons, *i.e.*, 22 + 7 × 14 = 22 + 98 = 120. The figure 14 is arrived at thus:—Every person has 30 descendants, 15 by his son and 15 by his daughter which son and daughter are brother and sister. *Ex-hypothesi*, in Table III, the brother of A′ to D′ and sisters of B to D are omitted. Therefore, the descendants of each omitted brother or sister would be 15—1 (brother or sister), *i.e.*, 14. The descendants of A′, being also descendants of A, her husband, have already been included in the paternal line. Mr. Mandlik of course commits the same mistake here also, as in his calculation on the paternal side.

Mr. Mandlik, according to his calculation, says that on the maternal side the number of persons ineligible for marriage by a bride or bridegroom is 105 males or females as the case may be, and thus he concludes that on both the lines the number of persons whom the bride or bridegroom as the case may be cannot marry by reason of *Sapinda* relationship is 2,121, the figure mentioned in para. 82 of Mr. Mayne's Hindu Law and Usage, 5th Edition. We have now shown that this calculation is clearly wrong. The correct figures for purposes of marriage are not given in this memorandum, the object being only to arrive at the correct calculation as to the number of *Sapindas* male and female lineally in the ascending and descending lines, and collaterally.

The total number, therefore, of *Sapindas* of a person on both sides, excluding his wife and the wives of the *Sapindas* who are his descendants, is 2,205 + 120 = 2,325.

Proceeding now to divide them into agnates and cognates, it may be at once observed that 120—1 (mother) or 119 *Sapindas* on the mother's side are necessarily cognates; the mother being regarded as an agnate as being the wife of an agnate. Out of the 2,205 *Sapindas* on the paternal side the number of agnates is only 29 as follows:—

In Table No. I, *i.e.*, among the ascendants of the propositus there are 6 male agnates, *viz.*, A, B, C, E, I and Q and 11 female agnates, *viz.*, wives of B, C, E, I and Q (A's wife, *i.e.*, the mother

of the propositus having been included in the maternal line) and the daughters of A, B, C, E, I and Q; thus making a total of 6 + 11 or 17 agnate ascendants. In Table No. II, *i.e.*, among the descendants of the propositus there are 6 male agnates A, B, D, H, P and f, and 6 female agnates A′, B′, D′, H′, P′ and f′ (sisters of A, B, D, H, P and f), thus making a total of 12 agnate descendants. Therefore, in both Tables I & II (ascendants and descendants) we have 29 agnates of whom 12 are males and 17 females. The number of agnates is so small because each pair being assumed to have only one son and one daughter, there are no two persons who are brothers. Deducting these 29 agnates from the total number of *Sapindas* on the paternal side, *viz.*, 2,205, the remaining 2,176 are all cognates. Among these 1,102—12 (the male agnates) or 1,090 are males, while 1,103—17 (female agnates) or 1,086 are females. Among the *Sapindas* on the maternal side amounting to 120, excluding the mother who is the only agnate, there are 119 cognates of whom 60 are males, and 59 are females. The result is, that out of the total number of *Sapindas* 2,325, the agnates are only 30, of whem 12 are males, 7 are females specified as heirs by special texts, and 11 are females not specified in any text. The remaining 2,295 are all cognates, of whom 1,090 + 60 = 1,150 are males and the remaining 1,086 + 59 or 1,145 are females, none of which females finds a place in any specified text; and if therefore by reason of their sex the cognate females none of whom is favoured by any special text be excluded, the heritable cognates under the Mitakshara system is 1,150 of whom excluding the daughter's son, the rest come in as cognates in default of *Samanodakas*. In the above calculation the wife of the propositus, the wives of collaterals, the wives of the descendants of the propositus, and the step-mother, step-grandmother, step-great-grandmother, &c., who are all the wives of ascendants and between whom and the propositus there is no blood-relationship, are excluded, though by a fiction they are brought within the circle of *Sapindas* of the propositus.

It may not be easy to classify the total number of cognate male *Bandhus* into the *three* classes of *Atma-bandhus, Pitru-bandhus* and *Matru-bandhus.* It will require enormous patience and time and considerable skill in applying to such classification the analogy furnished by Satatapa's text, and when such classification

is made, it will be found that in each class there will be several sets, the members of each one of which sets will *inter se* be of equal propinquity to the propositus and as such entitled to succeed in common.

Rajkumar Sarvadhikari in constructing his tables of heritable cognates introduces another principle, *viz.*, that, unless there be mutual *Sapindaship* between the propositus and the claimant, neither of them could inherit to the property left by the other. In regard to agnates mutuality of *Sapindaship* will never be wanting in any case. In regard to cognates it is no doubt true that in some cases the *Sapindaship* is not mutual. This is the result of counting seven degrees in the paternal line but only five degrees in the maternal line. The claimant may be within seven degrees of the paternal line of the propositus and, therefore, his *Sapinda*. But if the propositus be in the maternal line of the claimant beyond *five* degrees, the propositus will not be the *Sapinda* of the claimant. As agnates are necessarily connected on the paternal side of each, this anomaly will never happen in their case. In the case of marriage though there be no mutual *Sapindaship*, there can be no marriage between them. Though Sarvadhikari's view that unless there be mutual *Sapindaship* there can be no right of inheritance of either to the other is plausible and may probably be right, yet he cites no authority in support of that position. In the generality of cases, no doubt, rights of inheritance are mutual, and if Sarvadhikari's view that in every case it must be so, be sound, the number of heritable cognates would have to be considerably reduced. The absence of mutuality of *Sapindaship* occurs only among cognates on the paternal line and not among cognates on the maternal line. By referring to Table No. 2 in Mandlik's book, it will be seen that among the 126 descendants of each of the thirty-one persons omitted in Table No. I there are 48 persons to whom the propositus is not a *Sapinda*, though they are all his *Sapindas*. The total number of cognates, therefore, who will thus have to be excluded from the above number of cognates will be 1,536, made up as follows:—Of the 126 descendants (*vide* Table II) to 48 persons, *i.e.*, all the children of P′ to e′ and of H′ to O′, the propositus is not a *Sapinda*. Therefore, of the ascendants, (the persons omitted in Table I being 31) the number of persons among their descendants, to whom the propositus is not a *Sapinda* will be $31 \times 48 = 1,488$.

To this number add 48 out of the 126 descendants of the propositus to whom the propositus is not a *Sapinda*. The total non-mutual *Sapindas* will therefore be 1,488 + 48 = 1,536. Deducting 1,536 the number of non-mutual *Sapindas* from 2,295 the total number of cognate *Sapindas*, the number of heritable cognates, *i.e.*, cognates between whom and the propositus the *Sapindaship* is mutual, is 2,295—1,536 or 759. Among these 759 persons 377 are females. For, on the paternal side out of the total 2,205 *Sapindas*, 1,103 are females, of whom 17 are agnates. Of the remaining 1,103—17 or 1,086 cognates, the non-mutual cognates are ½ of 1,536 or 768. Therefore, the number of cognates between whom and the propositus there is mutual *Sapindaship* is 1,086—768 or 318. On the maternal side, of the 120 *Sapindas*, 60 are females of whom excluding the mother, (the only agnate on the maternal side), we have 60—1 or 59 female cognates between whom and the propositus there is mutual *Sapindaship*. Therefore, on both the paternal and the maternal sides we have 318 + 59 or 377 females between whom and the propositus there is mutual *Sapindaship*; and excluding these 377 females from inheritance on the ground that none of them is favoured by any special text, the heritable *Bandhas* are reduced to 759—377 or 382 who are all males, and they will have to be classified into *Atma-bandhus*, *Pitru-bandhus* and *Matru-bandhus*. That females unless specially named in any text are incapable of inheritance is fully recognized by the Dayabhaga School by the application of the doctrine of offering of oblations. Under the Mitakshara or Benares School also, they are excluded according to the decisions of the Allahabad and Calcutta High Courts by reason of a Vedic text and certain Smritis which declare females incapable of inheritance. In the Western or Bombay School which is chiefly governed by the Mayukha or the Mitakshara, the rule of exclusion is greatly relaxed and several unnamed females including the widows of collateral agnates and of agnate descendants are allowed to inherit among the class of male agnates. The High Court of Madras is tending to take a middle course and it holds that the Vedic rule of exclusion of females though not disregarded by the author of the Mitakshara is not fully recognized. It has been gradually bringing in, beginning with the sister, a few agnate females as entitled to inherit as cognates, they being, however, postponed at any rate to certain remoter cognate males. At one time owing to a

misconception it was supposed that certain relations may be brought in in the line of inheritance though they are not within the definition of *Bhandus* or *Bhinnagotra Sapindas.* Latterly the process of reasoning on which certain unspecified females are admitted as heirs seems to be that though born in the agnate family of the propositus and as such their *gotra* by birth is the same as that of the propositus, yet as they must be married and married to a stranger, they acquire the *gotra* or the family name of the husband which must be necessarily different from the *gotra* of her birth, and it is conceived that all the female agnates are, therefore, *Bhinnagotra Sapdinas* or cognates; and that the Vedic rule of exclusion of females which is not adopted in its entirety by the author of the Mitakshara should not be pushed so far as to exclude them altogether, but may be given effect to by postponing them at any rate to the males of the same class. Mr. Mandlik has at great length and with considerable force and ability dealt with this question of exclusion of females, and he decidedly comes to the conclusion that the author of the Mitakshara does not relax this rule. Messrs. West and Buhler in their treatise on Hindu Law, 3rd Edition, pp. 125 and 126, and *Chief Justice Westropp* and *Mr. Justice West* in I. L. R., 2 B. 434, try to maintain that the Vedic text has been misinterpreted and that the authors of the Mitakshara and Mayukha do not recognize such a rule of exclusion. As already stated the High Courts of Calcutta and Allahabad have taken a contrary view, while the High Court of Madras takes a middle view. In Yajnavalkya's text, after specifically mentioning a few of the *Sapindas,* the rest are split into *gotrajas* and *Bandhus,* the former, however, including, according to Mitakshara and other works of authority, *Samanodakas* also who are not comprised in the definition of *Sapindas. Gotraja* necessarily means "of the same *gotra*" and some maintain that it denotes the masculine gender and, therefore, will exclude agnate females including the wives of male agnates. But, even if it is of common gender, the question arises in the case of agnate females born in the family, whether they can be regarded as *gotrajas* which they can be regarded to be by birth, bearing in mind that their *gotras* must change permanently by their marriage, and whether, therefore, they being undoubtedly *Sapindas* are not really *Bhinnagotra Sapindas* and as such comprised among cognates or *Bandhus?* Nilakanta maintains that *gotraja*

is indicative of having the same *gotra* by birth and that has considerably influenced the Eastern School. On the whole, the view maintained by the Allahabad and Calcutta High Courts seems to be the sounder view and the recent course of decisions in Madras admitting certain females as heritable cognates, is not founded on any consistent principle, and can be supported only on rather a fanciful interpretation of the term *Bhinnagotra Sapinda* and by the assumption that the authority of the Mitakshara only partially recognizes the Vedic rule of exclusion of females from inheritance. The claim of the step-mother presented itself in *several cases*, but without any success; she by marriage having become of the same *gotra* as her husband and, therefore, of her step-son, cannot(1) be brought under the head of *Bhinnagotra Sapindas* or *Bandhus*; and the Madras High Court has not gone in favour of females as far as the Bombay High Court, which recognizes the widows of all agnate *Sapindas* as heirs, comprised in the class of *gotrajas* of Yajnavalkya. In none of the cases, however, is it declared that she can be no heir at all. In fact the tendency of the recent Madras decisions seems to be to create a non-descript class of *Bandhus* or relations who are not to be recognized as regular heirs but as having heritable capacity as against the crown claiming by escheat. As regards the term *Bhinnagotra Sapindas* it may be mentioned that it does not occur either in the definition of *Sapinda* or in Yajnavalkya's text on Inheritance. The term used in the above text is "*Bandhus*" and the author of the Mitakshara in his Commentary states that *Bhinnagotra Sapindas* are indicated by the term "*Bandhus*." Neither the term "*Bhinnagotra Sapindas*" nor the synonymous term "*Asagotra Sapindas*" is an accurate description of *Bandhus* or cognate *Sapindas*, for, instances can be mentioned in which the cognate may be of the same *gotra* as the propositus. Take for instance the maternal aunt's son, one of the nine *Bandhus* specified in the Mitakshara: he may be of the same *gotra* as the propositus, for, the mother and her sister might marry two males who may be agnates, or if not agnates, at least bearing the same family name or *gotra* and the issue of the two sisters will then be of the same *gotra*. The same thing might happen in the

(1) *Kumaravelu* v. *Virana Goundan*, I. L. R., 5 M., p. 29; *Muttammal* v. *Vengalakshmiammal*, *Ib.* 32; *Mari* v. *Chinnammal*, I. L. R., 8. M., 107; *Ramasami* v. *Narasamma*, *Ib.* 133.

case of the propositus and his daughter's daughter's son. The term *Bhinnagotra Sapinda* or *Asagotra Sapinda* must be understood with reference to the context as used in the sense that the *Sapinda* thereby indicated is not one who like an agnate or *Sagotra Sapinda* should *necessarily* be of the same gotra as the propositus. In fact there is no word which will be an exact and accurate equivalent of cognates or *Bandhus* who form one section of *Sapindas* as above indicated.

Under the Dayabhaga system of Bengal, the number of cognate kindred entitled to succeed, all being males both *ex-parte paterna* and *ex-parte materna*, is only 42, the females in whose favour there is no special text being excluded under that system on the simple ground that they are incompetent to offer oblations.

Under a system which recognizes only such of the cognates as satisfy the religious test, the number is necessarily narrowed to 42. But under a system which recognizes cognates on the principle of consanguinity within prescribed limits, the number is necessarily large amounting to 382 even after excluding females.

Rajkumar Sarvadhikari has made an elaborate and ingenious attempt in his Tagore Law Lectures, pages 687 to 735, to construct a table of *Bandhus* under the Mitakshara which is justly characterised as follows by *Dr. Jolly* :—

"An essentially new system of *Bandhu* relationship under "Mitakshara law has been recently proposed by Rajkumar Sar-"vadhikari. He takes the three *Bandhus* each as indicative of the "three principal classes of *Bandhus* and not as embracing the nine "*Bandhus* specially named only. This theory has the advantage of "giving a clue to the order of precedence among the *Bandhus*. "However though it is developed with rigorous logic from the "data put forth by its author, there is no sufficient foundation for "these data in the Mitakshara to commend its ready acceptance." (Tagore Law Lectures for 1883, by Dr. Jolly, p. 216.) At page 689 Sarvadhikari says that, in the case of *Bandhus* on the paternal side, there cannot be more than two females between the claimant and the propositus, and that, if there are two females, these two must be related as mother and daughter to each other. What his authority is for this position does not at all appear. If the father's line and the mother's line should be interpreted and

restricted to the father's agnate line, no more than one female can intervene and two females cannot intervene though they be related as mother and daughter. If, as already shown, there is no warrant for limiting the two lines to agnate lines, and that Sarvadhikari does not so limit it follows from his allowing the intervention of two females, it is impossible to find any principle in support of the position taken by him that more than two females cannot intervene between the propositus and the claimant. If he means thereby that *Sapinda* relationship as defined cannot subsist if more than two females intervene or even if two females who are not related as mother and daughter intervene, he is palpably wrong; but if he means that though *Sapinda* relationship may subsist, yet the claimant will not be a heritable cognate the position will be equally unwarranted; and he nowhere cites any authority that all *Bhinnagotra Sapindas* have no heritable rights under the Mitakshara but that only some of them have. No doubt among the nine *Bandhus* specified in the text of Satatapa, there is no instance in which three females intervene between the common ancestor and either the propositus or the claimant, and that in two instances therein given, *viz.*, the mother's maternal uncle's son and the mother's maternal aunt's son, two females related as mother and daughter, the maternal grandmother and the mother intervene between the common ancestor and the propositus.(1)

The enumeration being admittedly not exhaustive and the classification being illustrated by mentioning only three of each class, all the nine therein mentioned being within the definition of *Sapindas*, it will be altogether illogical and contrary to all rules of interpretation to exclude from the definition of *Sapindas, Bandhus* not enumerated in Satatapa's text or even such of the *Bandhus* as may be more remotely connected than any of the nine therein mentioned. Again at page 697, referring to the diagram therein given, Sarvadhikari says that B and B—s_3 are not heritable Sapindas of each other either through themselves or through their mothers and fathers and consequently the propositus and B—s_3 are not each other's *Sapindas.* They are not each other's *Sapindas* connected in such a manner that the heritable right may accrue to B—s_3 because the

(1) Mayne's Hindu Law, p. 667.

propositus is not a descendant of the line of the maternal grandfather either of B—s_3 or of his father, or of his mother. Similarly the propositus and C—s_2 are not *Sapindas* to each other either through themselves or through their fathers or their mothers. It is evident from this that Sarvadhikari labours under the impression that *Sapinda* relationships for purposes of inheritance is not co-extensive with the definition of *Sapinda* relationship for purposes of marriage, but that it is restricted to cases in which the propositus is a descendant of the line of the maternal grandfather either of the claimant or of his father or of his mother. This assumption again he probably makes because the nine specified *Bandhus* are so descended from such maternal grandfather either from the standpoint of the propositus or of the claimant.

JURISPRUDENCE.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER XVIII.

On the Kshetraja Son.

After defining the *aurasa* son, Vasishtha says :—" In default of him, the second, the son of a wife duly authorised, shall inherit.'(1) *Commentary*—' Authorised,' *i.e.*, by the husband or by his elders. ' Second,' *i.e.*, to the *aurasa* son.

Vishnu says : " The son begotten on the duly authorised wife by a *sapinda* or by one of the highest class is the second, the *kshetraja* son."(2)

Manu says : " He who is begotten according to law on the wife of a man deceased, impotent or diseased, after she is duly authorised is called the *kshetraja* or the son of the wife." (3) *Commentary* —' *Talpah* ' means ' wife.' The disease contemplated must be incurable. ' According to law,' *i.e.*, ' after being smeared with ghee, etc.'

Yajnavalkya says : " The son begotten on a wife by one of the same *gotra* with the husband or by another is called the *kshetraja* son."(4) *Commentary*—' *Sagotrena* ' means ' by one of the same family.' ' Another,' *i.e.*, of the highest class.

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(1) Vasishtha, Chap. XVII, 14. (2) Vishnu, Chap. XV, 3.
(3) Manu, Chap. IX, 167. (4) Yajnavalkya, Chap. II, 128.

Baudhayana says :—" The son begotten by another on the wife of a man deceased, impotent or diseased after being duly authorised in that behalf, is called the *kshetraja* or the son of the wife. He becomes the son of two fathers, is of both the families and performs the obsequies and takes the heritable wealth of both the fathers."(1) *Commentary*—He who is begotten by another sonless man, such as the brother-in-law, etc. The form '*Dvipita*' is grammatically correct, the *kap* suffix being optional. '*Dvigotrah*' means 'belonging to both families.' '*Svâdah*' means 'obsequies.'

Yajnavalkya says :—" The son begotten by a sonless man on the wife of another duly authorised is declared heir to both and shall perform the funeral rites of both fathers."(2) *Commentary.*—But when a man having a son begets a son for another upon that other's wife, the son so begotten belongs not to the begetter but to the husband of the mother. But if though having a son, he begets a son upon another's wife and sets about it saying 'the son to be born shall belong equally to us both,' then the son so begotten becomes the son of both.

Manu says :—" The owners of the seed and of the soil are seen in this world as joint sharers of the crop, where the seed had been given in consideration of a special agreement to share the crop."(3)

Narada and Katyayana say : " The offspring of the seed sown by one in another's field with the owner's permission is considered to belong equally to the owners of the seed and of the soil."(4)

Sankha and Likhita say :—" Angiras has declared that the offspring belongs to the husband of the mother. But Usanas says that the produce of the seed sown with the consent of the owners of the soil and of the seed shall be shared by both."(5) *Commentary*—'*Mantrasamskarakartuh*' means 'of the husband who takes her hand.' '*Sasyam*' means 'produce of the soil.'

Harita says : " The son begotten on the wife by another, her husband living, is considered by some as that husband's alone

(1) Baudhayana, II, 2, 3, 17 and 18.

(2) Yajnavalkya, Chap. II, 127.

(3) Manu, Chap. IX, 53.

(4) Not found in Narada but quoted at page 366, Cole. Dig., Vol. II, as Katyayana's.

(5) Cole. Dig., Vol. II, 363, CCXL.

because she was not independent. If begotten after his death, the son is considered as the son of two fathers; because the husband did not sow the seed. The soil produces nothing without the seed; nor does seed germinate without soil. As both these are seen, some say that he is the son of both. Among these, he is primarily the son of the begetter. Let him offer two funeral cakes and celebrate both fathers with each cake. His son shall name both with the second cake, his grandson with the third; and those remoter descended down to the seventh degree shall make this offering for both ancestors to three degrees."(1) *Commentary*—While the husband is alive, the *kshetraja*, though born of another, belongs to the husband, because women are not independent. When he is dead, although the dependence of the wife survives according to the text, 'The sonless wife not violating the bed of her husband, etc.,' still sages declare the *kshetraja* to be the son of two fathers, because the seed had not been sown in the soil. Not that there is the sower of the seed when the husband is alive; but that, as the author says, the combination of the virtue of the seed and of the soil with the consent of their owners is the cause of the offspring. '*Nirvapah*' means 'rites in honor of the deceased'; because by them the deceased are propitiated. He may celebrate both fathers with the same *pinda* or both with each of the *pindas*. If he is the son of two fathers he must celebrate both with each of the *pindas*. This is agreeable to Apastamba's view. '*Dvitiya putram*' means 'beginning with the son, with the second cake, etc.' Those remoter descendants who offer the wipings shall make the offering in celebration of both ancestors in each of three degrees.

Narada says: "The son of two fathers shall separately offer *pinda* and water to both and shall take half a share from the estate of his begetter and another half from the estate of his mother's husband."(2) *Commentary*—This text applies where the begetter has an *aurasa* son and the husband of the wife has somehow an *aurasa* son subsequently born. But when neither of them has another son, he takes all the wealth of both.

Baudhayana says: "They also quote as follows: He, the *kshetraja* son, shall offer *pinda* to both, and with every *pinda* he shall pronounce both names. To six, three *pindas* should be given;

(1) Cole. Dig., Vol. II, 365, CCXLI. (2) Narada, Chap. XIII, 23.

so acting, he incurs no sin."(1) *Commentary*—'Incurs no sin' means 'is not censurable.'

Here ends the chapter on the *Kshetraja*.

CHAPTER XIX.

On the appointed daughter and her son.

On this subject, Vasishtha says: "An appointed daughter is considered as the third kind of son. She who has no brothers acquires filiation reverting to the family of her ancestors and becomes equal to a son."(2) *Commentary*—'An appointed daughter is the third son, equal to the *aurasa* son, because she performs his duties. She reverts to the family of her ancestors and attains the rank of a son.

Sankha and Likhita say: "The son of Prachetas has said that the appointed daughter is like the son. Her offspring (the son of the appointed daughter) shall offer the *pinda* to both the maternal and the paternal grandfathers. There is no difference perceived in the world between a son and a daughter's son in respect of benefits conferred by them. From this doubt a man should not marry a brotherless maiden."(3) *Commentary*—'Benefits conferred,' *i.e.*, delivery from the hell called *put*. 'From this doubt' means 'from the doubt whether she has been made an appointed daughter or not.'

Yajnavalkya after speaking of the *aurasa* says: "The son of the appointed daughter is equal to him."(4)

Devala says: "The son of the appointed daughter is equal to him, the *aurasa* son, and like a son shall inherit the wealth of his father and also of his maternal grandfather, if he has no male issue."(5)

Baudhayana says: "A son born of a daughter expressly appointed is the son of an appointed daughter, any other is a daughter's son."(6) *Commentary*—'*Abhyubhajanya*' means

(1) Baudhayana, II. 2, 3, 19.
(2) Vasishtha, Chap. XVII, 15 and 16.
(3) Cole. Dig., Vol. II, 338, CCIV.
(4) Yajnavalkya, Chap. II, 128.
(5) Cole. Dig., Vol. II, 337, CCI.
(6) Baudhayana, II, 2, 3, 15.

appointed with the statement in the form 'the son born of this (daughter) shall be my son.' '*Dauhira*' means 'son of the daughter.' He should be regarded as the son named 'the son of the appointed daughter.' 'Any other,' *i.e.*, than such daughter's son. Kalpataru reads '*asyam*' for '*anyam*.' That is easily understood.

Manu says: "The son of the appointed daughter shall inherit the whole wealth of his sonless father. A daughter's son alone inherits the whole wealth of the sonless deceased."(1) *Commentary*—'Sonless' means 'having no *aurasa* son.' Prakâsakâra says that the second half of the verse is an explanatory repetition of the first. Udayakara in his commentary on Manu says that the second half repeats the same statement with a reason.

Devala after speaking of the *aurasa* son says: "The son of the appointed daughter is equal to him (the *aurasa* son) and is regarded as an heir. He alone shall give the *pinda* to his father and his maternal grandfather. There is no distinction in the world, according to law, between a son's son and a daughter's son; because the father and the mother of these were born out of the same body. By the son who is born of a daughter whether appointed or not, from a husband equal in caste, the maternal grandfather becomes a father. He shall give the *pinda* to the maternal grandfather and take his wealth."(2) *Commentary*—'Sonless' means 'having no *aurasa* son.' *The daughter's son* is the son of the daughter whether appointed or not.

Brihaspati in speaking of the appointed daughter says: "Just as she has ownership in the wealth of her father, even though there are kinsmen, so her son also has ownership in the wealth of his mother and his maternal grandfather."(3)

Sankha and Likhita say: "The daughter takes the *stridhana*, and the wealth of her mother's son also is her share."(4) *Commentary*—The word '*tat*' stands for 'the daughter's mother.' Of her son subsequently born and dying without male issue, the daughter

(1) Manu, Chap. IX, 132.

(2) Not found in Cole. Dig. This text belongs probably to some other author, in view to Devala's text already quoted.

(3) Brihaspati, Chap. XXV, 58.

(4) Cole. Dig., 353, CCXXV.

takes the wealth; because she is equal to the deceased's brother. This is the drift.

Manu says: "A sonless man may appoint his daughter in the following manner, to raise offspring for him:—'The male child to be born of her shall be mine and perform my funeral rites.' "(1) *Commentary*—'*Svadakaran*' means 'performing *sraddha*, etc.'

Vasishtha says: "I give my brotherless daughter decorated to you, thinking that the son who shall be born of her will become my son."(2)

Gautama says: "A man having no male issue may appoint a daughter after making an oblation to the fire and performing the *Prajapatya* sacrifice declaring 'her offspring shall be mine.' But some say she may be so appointed by mere intention."(3) *Commentary*—'*Agnim Prajapatim cheshtwa*' means 'after performing the *Agneyi* and the *Prajapatya* sacrifices' or 'performing a single sacrifice with the legal fire' or in default of it, simply worshipping. So says Harihara. '*Samvadhya*' means 'after declaring.' '*Abhisandhimatrat*' means 'by mere intention.' This is a corroboration of the previous view.

Brihaspati says: "Gautama said that a daughter should be appointed after oblation to the fire and the Prajapatya sacrifice. But others have said that the daughter of a sonless man is appointed by his mere will."(4) *Commentary*—'*Chinthitha*' means "at the thought 'this is my appointed daughter.' "

Vishnu says: "The declaration is in the form 'The son who shall be born of her shall be my son.' "(5) *Commentary*—She who is given as an appointed daughter and who has neither father nor mother is certainly an appointed daughter.

The Brahma Purana says: "The daughter of a sonless man who is treated in his mind like a son or appointed in the presence of the king, the sacrificial fire, or kinsmen, or anywhere or by him supposed to be a son when in the womb or given to the bride-

(1) Manu, Chap. IX, 127.
(2) Vasishtha, Chap. XVII, 17.
(3) Gautama, Chap. XXVIII, 18 and 19.
(4) Brihaspati, Chap. XXV, 38
(5) Vishnu, Chap. XV, 5.

groom with *sulka* for that express purpose, after the death of the father should be regarded as an appointed daughter. Such a daughter takes an equal share of the paternal wealth."(1)

Manu says: "Let the son of an appointed daughter offer the first funeral cake to his mother, the second to her father and the third to the father's father."(2) *Commentary*—The word '*Asyah*' (of her) should be read into the last clause.

Here ends the chapter on 'the appointed daughter and her son.'

CHAPTER XX.

On the son by a twice-married woman.

On this subject, Vishnu says: "The fourth in order is the son by a twice-married woman."(3)

Manu says: "The son whom a woman either forsaken by her lord or a widow begets of a second husband whom she married out of free will is called the son of a twice-married woman."(4) *Commentary*—After 'begets' the word '*savarnat*' (of one equal in caste) must be read. '*Punarbhutva*' means 'having married a second husband.'

Yajnavalkya says: "A son begotten upon the wife (of another) whether deflowered or not is called the son of a twice-married woman."(5)

Katyayana says: "A son begotten on a woman who deserting an impotent or degraded husband marries a second is the son by a twice-married woman. He clearly belongs to the begetter."(6)

Here ends the chapter on 'the son by a twice-married woman.'

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(1) Cole. Dig., Vol. II, 356, 2 & 3.
(2) Manu, Chap. IX, 140.
(3) Vishnu, Chap. XV, 7.
(4) Manu, Chap. IX, 175.
(5) Yajnavalkya, Chap. II, 130.
(6) Cole. Dig., Vol. II, 383, CCLXVIII.

CHAPTER XXI.

On the son of a maiden.

Vasishtha says: "The son of a maiden is the fifth in rank. The son whom an unmarried damsel produces through lust in her father's house is called the son of a maiden and becomes the son of his maternal grandfather. So sages have declared. On this point, they also quote the following verse: 'By the son whom an unmarried daughter produces from a man equal in caste, the maternal grandfather becomes a father. He shall offer the funeral cake and take the wealth.' "(1) *Commentary*—'Kamat' means 'of her own free will.' 'Apradatta' means 'unmarried.' '*Tulyatah*' means 'from a man equal in caste.'

Baudhayana says: "The son begotten on a damsel not married and not given is called the son of a maiden."(2) *Commentary*—'*Asamskrita*' means 'devoid of the *samskara* of marriage.' '*Anatisrishte*' means 'not given.'

The Brahma Purana says: "The son begotten upon an unmarried woman in her father's house by a man equal in caste is called the son of the maiden and becomes the son of the man to whom she is afterwards given."(3)

Narada says: "The husband should be regarded as the father of the son produced by his wife while a maiden, the son of the pregnant bride and the son of concealed birth. They are also declared heirs to his wealth."(4) *Commentary*—'*Sahodha*' means 'conceived in the womb at the time of marriage.' Here if the maternal grandfather has no son, then the son of the maiden and the son of the pregnant bride are his sons. If the maternal grandfather has sons, then they are the sons of the husband. Where both are sonless, they are sons of both. So says Parijata.

Here ends the chapter on 'the son of the maiden.'

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(1) Vasishtha, Chap XVII, 21, 22 and 23.
(2) Baudhayana, II, 2, 3, 24.
(3) Not found.
(4) Narada, Chap. XIII, 17.

CHAPTER XXII.

On the son of concealed birth.

On this subject, Vishnu says: "The son of concealed birth is the sixth in rank. He belongs to him on whose wife he was begotten."(1)

Manu says: "A son born in whose house soever, if his father could not be discovered, belongs to the husband of the wife of whom he is born; and is called the son of concealed birth in his house."(2) *Commentary*—'*Talpajah*' means 'born of the wife.' As the owner of the seed is not known, he certainly belongs to his mother's caste. This would be so in the absence of suspicion of connection with one of inferior caste. But where such suspicion exists he is unfit for all purposes and would belong to the *pratiloma* class.

Here ends the chapter on 'the son of concealed birth.'

CHAPTER XXIII.

On the son of the pregnant bride.

On this subject, Vishnu says: "The son of the pregnant bride is the seventh in rank."(3) *Commentary*—The son of the pregnant bride belongs to the husband who marries her. Here Prakasakara considering that the *mantras* relating to the marriage ceremony apply only to maidens, questions the *sam-skara* of a pregnant woman. He concludes by saying that according to others, there is a mode pointed out in the *Srutis* of repeating the same *samskara* according to the form prescribed in the Atharvana Veda. But really the word '*samskara*' contemplates purification by *homa* and other *karma* distinct from that produced by the *mantras* recited at the time of marriage.

Manu says: "If a pregnant woman, whether known or not known to be pregnant, is married, the son in the womb belongs to the husband and is called the son of the pregnant bride."(4)

Here ends the chapter on 'the son of the pregnant bride.'

S. SITARAMA SASTRI.

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(1) Vishnu, Chap. XV, 13 and 14.
(2) Manu, Chap. IX, 170.
(3) Vishnu, Chap. XV, 15.
(4) Manu, Chap. IX, 173.

NOTES OF INDIAN CASES.

Queen-Empress *v.* **Motha**, I. L. R., 20 M., 239. There seems to us to be very little doubt that it is competent to a court asked to give sanction under S. 195 to hold an enquiry and record other evidence than that already before it. It is one thing to say that such a course is legal, but it is quite another to recommend it as proper. The policy of the law requiring sanction before a prosecution for perjury is to ensure that only gross cases shall be brought before the criminal tribunals and that there should be no reasonable possibility of the offender escaping justice. If the culpability was not manifest on the face of the record, it would seem to us highly undesirable to determine whether a particular statement can be proved to be false. If recording of additional evidence was contemplated, S. 195 would have made a reference to such preliminary enquiry as might be necessary. The absence of that language which appears on the other hand in S. 476 is an index to the undesirability of such a procedure.

Balusami Pandithar *v.* **Narayana Rau**, I. L. R., 20 M., 342. There is an interesting question of Hindu law in this case as to whether a sister's son's son or a maternal uncle's son is the nearer heir. The case forcibly illustrates the meagreness of the *Smrithi* law. Courts have had to evolve from a very few texts the whole class of heritable *bandhus* and the relative superiority of the members of that body. Both the individuals named are of course in the class of *atma bandhus*. No rule of preference within each class has been in terms laid down. The learned Judges have had recourse to two principles for the purpose of arriving at a conclusion in the case. One is, the sister's son's son claims relationship through a nearer ancestor of the propositus, namely, the father, than the maternal uncle's son. Another, that a *bandhu, ex-parte paterna*, is preferable to a *bandhu, ex-parte materna*. The latter principle is supposed to underlie the order of enumeration of the *bandhus* of each class, the father's sister's son being mentioned first. Other cases may be conceived in which these two principles may come into conflict. Which of them is then to prevail is not indicated by the learned Judges.

Ponnambala Pillai *v.* **Sundarappayyar**, I.L.R., 20 M., 354. This case raises rather a novel question of Hindu Law. There was a contract for sale of property made by a father to whom a son is born after the contract; and the vendee obtains a decree for specific performance in a suit against the father alone. The question raised is whether the son has any right to recover his share. The father contracted to sell the whole, and there is no doubt that he was perfectly justified in doing so. It is equally clear that the father's right to deal with the son's share also

is subject to the condition that there should be justifiable necessity or an antecedent debt or at least a sufficient enquiry of the purpose on the part of the purchaser. The fact that there was a binding obligation upon the father would entitle the purchaser to recover damages if the father failed to complete the purchase. Is there any difficulty in regarding the antecedent obligation as of the same character as an antecedent debt so as to justify the alienation? Even though by operation of law, an undefined share of the property has passed to the son by his subsequent birth, it seems open to question whether there is anything wrong in extending the scope of the father's power to alienate in discharge of his antecedent debts to alienations in discharge of other antecedent obligations. Nor do we see why the son should be in a better position than a purchaser from the father with notice. The point is, however, one not free from difficulty and should have received, we think, better treatment at the hands of the learned Judges.

Krishnasami Ayyangar v. Ranga Ayyangar, I.L.R., 20 M., 369. A decree for partition having been made, an agreement was entered into with reference to a portion of the property which fell to the share of one of the plaintiffs who died, his share passing to a survivor. A suit brought upon the basis of that agreement for the property agreed to be given was dismissed though it was held that an action for damages would lie for a breach of contract. According to the present Code, there is nothing to prevent the agreement forming the subject of a fresh suit. In the case of decrees for money where there is an uncertified *payment*, a fresh suit does not lie for the recovery of the money, but only for damages for breach of the contract to certify. But an *agreement* to deliver land might well form the subject of a fresh suit.

Rangayya Appa Rao v. Ratnam, I. L. R., 20 M., 392. In a suit to set aside a distraint, it was held that the pattah was improper and the distraint was set aside. In a subsequent suit to recover rent upon the same pattah, it was held by *Subrahmania Aiyar* and *Boddam*, J.J., that the decision of the Revenue Court has not the force of *res judicata*. There can be no doubt that the learned Judges are right, having regard to the language of S. 13. But there ought to be a more satisfactory statement of the law in the statute concerned.

Vasudeva Upadyaya v. Visvaraja Thirthasami, I. L. R., 20 M., 407. An appeal against an order of remand was disposed of by a single Judge of the High Court and the question was whether an appeal lay from his order under S. 15 of the Letters Patent. We have already expressed our opinion that such an appeal does lie and that the Code of Civil Procedure does not overrule S. 15 of the Letters Patent, 2 M.L.J. 343. We

must express our concurrence in the view of *Subrahmania Aiyar*, J., and can only add our regret that the question was not referred to a Full Bench.

Ramalinga Chetti *v.* **Raghunatha Rau,** I. L. R., 20 M.,418. The plaintiff sued the defendant for money due upon a balance of account. The defendant alleged that the balance was in his favor. The defendant first stated that he would file a separate suit for the recovery of the balance but afterwards asked leave for the amendment of the written statement and for the insertion of a claim for the balance. The Sub-Judge refused the amendment and the High Court upheld the refusal. The plaintiff did not ask for an account, because he was the accounting party. We think there is nothing to prevent the defendant claiming a decree for the actual balance in case upon taking accounts there was such a balance in his favour. It is not necessary that the suit should have been one for an account to entitle the defendant to a decree for the balance, but it was quite sufficient if the taking of accounts was necessary for determining if there was a balance due to the plaintiff. It may be that S. 12 does not bar a separate suit, but the defendant is entitled and it is undoubtedly convenient to have the question of what amount is due to him settled in one and the same suit.

Uthunganakath Avuthala *v.* **Thazhatharayil Kunhali,** I.L.R., 20 M., 435. We doubt the correctness of the decision in this case. An agreement not to demand compensation for improvements previously effected, does not appear to us to come within the scope of S. 12 of the Tenants' Improvements Act of 1887. It is certainly open to the tenant not to claim improvements in the suit or to agree to a compromise whereby he relinquishes the claim and it follows to our mind that he could do so before suit. The policy of the law is to invalidate contracts entered into in anticipation and to prevent the landlord profiting by them as such bargains are notoriously improvident. We think the grammatical interpretation of the section as well as the logical is against the view taken by the learned Judges.

Ramasami Kottadiar *v* **Murugesa Mudali,** I. L. R., 20 M., 452. The property of a debtor who had become insolvent, and as regards whose property a vesting order had been made was attached in execution of a decree against him. This attachment is clearly illegal. When the vesting order is discharged we do not think that the attachment can be deemed to have been subsisting. At all events, at the same time the vesting order is discharged, a composition deed to which the attaching creditor was a party, vested the property in the trustees. It appears to us that the trustees

take the property free from attachment. The attachment was invalid during the subsistence of the vesting order and the moment the vesting order was withdrawn the property passes to the trustee under the composition deed. The view taken by the learned Judges that the trustees take the property subject to the attachment does not appear to us to be sound.

Barbar Maran *v.* **Ramana Goundan**, I. L. R., 20 M., 461. The decision in this case is one of considerable importance. Payment to one of two joint mortgagees is held to be a sufficient discharge. *The Chief Justice* and *Shephard*, J., dissent from the English case of *Steeds* v. *Steeds*, 22 Q. B. D., 540. We think there is considerable force in the argument of the learned Judges against the correctness of the decision in the English case. There is no doubt that the view taken should be the law, even though it be not.

Gantapalli Appalamma *v.* **Gantapalli Yellayya**, I. L. R., 20 M., 470. There can be very little doubt that the decision in *Queen-Empress* v. *Mannatha Achari*, I. L. R., 17 M., 260, was rightly overruled in this case. The adultery of the husband which entitles the wife to claim separate maintenance cannot be confined to the offence defined in the Indian Penal Code. The words 'living in adultery' point of course to a continuous course of conduct as explained by *Shephard*, J. But the conduct continued need not be what is punishable under the Penal Code.

SUMMERY OF RECENT CASES.

Civil Procedure Code, S. 108—Decree ex-parte—Appearance—Pleader retained in suit but not instructed.

Shankar Dat Dube *v.* **Radha Krishna.**

A party defendant retained a pleader to defend the suit against him and the pleader filed a vakalatnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held: that this decree was a decree *ex-parte* within the meaning of S. 108 of the Code of Civil Procedure. *Bhagwan Dai* v. *Hira* (I. L. R., 19 A., 355) and *Jonardan Dobey* v. *Ramdhone Singh* (I. L. R., 23 C., 738) referred to. *Sahibzada Zein-ul-abdin Khan* v. *Ahmed Raza Khan* (L. R., 5 I. A., 233) distinguished:—*The Allahabad Weekly Notes for 1898, p. 17.*

Civil Procedure Code, Ss. 483 and 588—Appeal—Order refusing attachment.

Amba Prasad v. Narain Das.

No appeal lies under S. 588 of the Code of Civil Procedure from an order dismissing an application under S. 483 of the Code for an order for the attachment of some property to meet any decree which the applicant might obtain under S. 90 of the Transfer of Property Act, 1882:—*The Allahabad Weekly Notes for* 1898, *p.* 18.

Civil Procedure Code, S. 440—Guardian and minor—Suit brought on behalf of a minor by a person other than the minor's certificated guardian.

Sham Krishna v. Ram Das.

Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was *held* that the suit was wrongly brought, having regard to. S. 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt* v. *Ram Lal Dhukri* (I. L. R., 13 C., 189) referred to:—*The Allahabad Weekly Notes for* 1898, *p.* 9.

Act No. IX of 1887 *(Provincial Small Cause Courts Act), sch. ii, cl.* 31—*Civil Procedure Code, s.* 586—*Suit of the nature cognizable by a Court of Small Causes—Suit for damages for eviction from land—Jurisdiction.*

Prasadi Lal v. Imdad Husen.

A suit to recover damages on account of the alleged wrongful eviction of the plaintiff from immovable property is not a suit falling within clause 31 of the second schedule to Act No. IX of 1887, though the profits of the property may be a measure of the damages claimed. *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I. L. R., 23 C., 884) followed;—*The Allahabad Weekly Notes for* 1898, *p.* 10.

Admiralty—Damage by collision—Public body entitled to damages.

The Owner of No. 7 Steam Sand Pump Dredger *v.* The Owners of S.S. "Greta Holme." 'The Greta Holme." [1897, A. C. 596].

"It is clear law that in general a person who had been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called tangible pecuniary loss by which is meant that he is a definite sum of money out of pocket owing to the wrong he has sustaind." It was attempted in this case to limit the application of this principle of law by excluding from its operation cases where the person injured happens to be a public body that has a duty cast upon it to be discharged for the benefit of the public and consequently cannot in any sense be said to own a chattel so as to derive for itself some profit by the use of it. The House, however, by a large majority refused to accept this limitation. The steamship *Greta Holme* belonging to the respondents, owing to her negligence, collided in the river Mersey with the Steam Sand Pump Dredger No. 7, which is the property of Mersey Docks and Harbour Board the appellants; and in consequence the respondents were condemned in damages, the amount of it being left to the Registrar for determination. The Registrar refused to allow the plaintiffs one main item, *i.e.*, a sum of money representing the loss to which the plaintiffs were put to during the time the dredger was under repair. The main reason assigned was that the plaintiffs were not in the position of a trading company and were not entitled to claim loss of profits, and although their dredging operations were, no doubt, delayed by the disabling of the dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." This decision of the Registrar was upheld by the President of the Probate Division and by the Court of Appeal. The plaintiffs then preferred an appeal to the House of Lords and that House reversed the decision of the Courts below and held that the plaintiffs notwithstanding that they were a public body were entitled to the right to which they would have been entitled if they had been a private body or individual

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Declaration with respect to rights over which there is no jurisdiction.

Barraclough *v.* Brown and others [1897, A. C. 615].

S. 47 of the Aire and Calder Navigation Act, 1889, enacts that where any vessel is sunk in the river Ouse and abandoned by its owner, it shall be lawful for the undertakers to remove the wreck and recover

their expenses of such removal from the owner of the vessel in a court of summary jurisdiction. The plaintiff who was the secretary to the undertakers of the rivers, Aire and Calder, and in whom the navigation of the river Ouse had been vested sued the defendants for the recovery of the sum they had expended in removing their steamship *J. M. Lennard*, which had capsized and sunk in the river and subsequently abandoned by the defendants her owners. The action was brought in the High Court and purported to be based upon S. 47, mentioned above. The House of Lords held that at common law the defendants were under no liability to pay these expenses and that as the liability was one created by a statute it could be enforced only in the way which the statute has provided for its enforcement. The House was, therefore, of opinion that the High Court had no jurisdiction to entertain the suit. An argument was advanced for the plaintiffs, *i.e.*, that although the High Court might have no power to grant a debt decree, it may grant a declaration that on a true constitution of S. 47, the plaintiffs were entitled to recover the amount from the defendants. The House overruled this argument without any hesitation. In so doing, *Lord Watson*, a member of the House observed:—

"In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature; and were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make could be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary jurisdiction conferred by the Legislature upon another tribunal."

Easements—Benefit to dominant tenement.

Simpson *v.* The Mayor, &c., of Godmanchester and another.

[1897, A. C. 696].

The appellant brought an action against the respondents for an injunction to restrain them from trespassing upon or interfering with his locks on the banks of the river Ouse. The plaintiff had certain locks on the banks of the river within his estate by which the water of the river can be let out in times of flood into the fields on the sides of the river and thus save the lands lower down from inundation. The respondents were the owners of some lands lower down the river from the point where those locks were situated and they from time immemorial enjoyed as of right, and without interruption, the right of opening these

locks in times of flood or upon every likelihood of flood and thus save their lands from damage by inundation. In the Courts below the plaintiff contended that this was a new kind of easement unknown to law and as such ought not to be recognised. But this contention was overruled by the Lord Chancellor and other Judges who sat with him in the Court of Appeal (*vide* 1896, 1 ch. 214, and VI, M. L. J., 116). The plaintiff then preferred this appeal to the House of Lords and raised a new question there that an easement of the nature said to have been exercised by the respondent corporation cannot be legally constituted in favor of the lands vested in the respondent corporation as dominant tenement inasmuch as lands other than those of the respondents to which no such easement is attached were benefited by its exercise. This contention, however, was rejected by the House. *Lord Watson* in delivering judgment said:— "But the proposition is as destitute of foundation in authority as it is, in my opinion, unreasonable. It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement which is serviceable and beneficial to that estate shall cease to exist whenever from the nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands or tenements." The decision of the Court of Appeal was therefore confirmed.

Trade name—Common law right in name—Fraud.

The Birmingham Venegar Brewery Company, Limited, v. Powell.

[1897, A. C. 710].

Turner, L. J., said in *Burgess* v. *Burgess* [1853, 3 D. M. and G., 204]:— "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." This proposition has been accepted and acted upon by courts of justice for a long number of years. A daring, and we hope a last, attempt was made in this case to shake the authority of the dictum above cited. The respondent had for a number of years been manufacturing a sauce, in accordance with a secret recipe, and selling it in the market under the name of "Yorkshire relish." The name had come to mean in the market the respondent's manufacture. The appellants recently began to manufacture a similar sauce and sold it in the market also under the name of "Yorkshire relish" so that the public bought it under the mistaken belief that it was the respondent's manufacture though many of the purchasers did not know the respondent by name in connection with the manu-

facture. Under these circumstances, *Stirling*, J., and confirming his decision, the Court of Appeal granted an injunction to the respondents restraining the appellants from using the expression "Yorkshire relish" on their labels. The appeal was argued for three days in the House and the decision of the Courts below was finally confirmed. One new point that was settled by the decision of the House in this case is that it is wrong to suppose that one trader cannot pass his goods off as the goods of another within the meaning of the rule above cited, unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their minds at the time of the purchase the idea that they are made by that individual. The House unanimously overruled such a contention and confirmed the decision of the Court of Appeal [*vide* 1896, 2 Ch., 54.]

JOTTINGS AND CUTTINGS.

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The Judicial Trustees' Act of 1896 *with notes* by Gerald John Wheeler, M.A., L.L.B., published by *Butterworth and Co., 7, Fleet Street E. C., London*:—Price *S.* 10.

The Mind.—A monthly Journal of Science, Philosophy and Religion, edited by John Emery McLean; published by *the Alliance Publishing Company*, 19 *and* 21 *W.* 31*st Street, New York, America.*—Annual subscription $ 2.

The Law of Meetings, by George Blackwell, published by *Butterworth and Co., 7, Fleet Street, E. C., London*:—Price *S.* 2-6.

The Law of Sedition, by J. Chauduri, M.A., Bar.-at-Law, published by *The Weekly Notes Printing Works, 3, Hastings Street, Calcutta*:—Price Rs. 1.

The Presidency Small Cause Courts Act, by C. V. Visvanatha Sastri, B.A., B.L., and K. Krishnama Chariar, B.A., B.L., published by the *Vyjayanti Press, Mount Road, Madras*:—Price Rs. 1-8.

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The Allahabad Weekly Notes for February (*in exchange*).
The Green Bag for February (*in exchange*).
The Canadian Law Times for February (*in exchange*).
The Harvard Law Review for January and February (*in exchange*).
The Canadian Law Journal for February (*in exchange*).
The Educational Review for February (*in exchange*).
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The Sedition Act:—The Government has at last succeeded in passing its sedition law. The whole Native and Anglo-Indian communities opposed the measure. Responsible members of Government ridiculed the opposition. One high placed official said he wanted a strong weapon in the armoury of Government. Another made fun of the stupidity of the opposition in pretending to be able to influence the Government. Mr. Chalmers stated in his opening speech on the occasion of the introduction of the measure that it was the enactment of the English law. At the time of the passing of the measure when it had been shown that his Bill was not the English law, he turned round and said that that law would not suit the circumstances of this country. The Anglo-Indian community is told that the Government alone is responsible for the good government of the country and they knew better what sort of law was needed in the present circumstances of the country. We are assured at the end that the Government only wanted a giant's strength and they would not use it like a giant. Can we suppose, that the Government that could not keep their heads cool over the murder of one European officer or two by some ignorant and foolish man who had absolutely no connection with the rest of the community, can be trusted to keep within the limits of moderation and sound judgment when a cry comes from any quarter to enforce the law that is enacted? We think the Sedition Act is a most unhappy measure and a more suicidal step was never taken by the Government of this country.

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The Madras Advocate-General:—Intelligence has at last been received of the appointment of an Advocate-General direct from England in preference to the distinguished lawyer who has been doing the duties of that office. It would have been an act of singular political wisdom of which perhaps the present Government is incapable if the Hon. Mr. Bhashyam Aiyangar had been confirmed in his place. It would certainly have been an act calculated to promote the best interests of Government; and an Advocate-General second to none that has ever preceded him in the office and probably superior to most of them would have been secured for the service of Government. A late distinguished Judge of the Madras High Court who knew Mr. Bhashyam Aiyangar only as he was 15 years ago and had seen Mr. John Bruce Norton and Mr. John D. Mayne in their best days at the bar, in a letter to a friend in Madras, wrote about Mr. Bhashyam's appointment as Advocate-General, "I was rejoiced to see Bhashyam Aiyangar's appointment as Advocate-General. There has never been an abler man at the Madras Bar in my judgment." We are having instead a lawyer from England unacquainted with any of

the Indian enactments and a stranger to the Revenue history of the country or the usages and customs with reference to which he is likely to be called upon to advise. It is not like the appointment of a Judge who will have both sides placed before him by competent lawyers before he is called upon to pronounce his judgment, in which case general legal attainments of a high order would be a sufficient qualification. If the new man be barely equal to the duties of his office without landing the Government in blunders of one kind or another at the beginning of his career, this is the best we are entitled to hope. We venture to think that if the opinions given by Mr. Bhashyam Aiyangar during his one year's incumbency of the office be collected, they will show better judgment and greater knowledge and research than those of any of his predecessors for a corresponding period. We do not say this in dispraise of Mr. Arnold White; for we know nothing against him. But we cannot but think that the Secretary of State, or as we are informed, the Government of India has committed a serious mistake in the supersession of Mr. Bhashyam Aiyangar.

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Disposal of Miscellaneous cases in the Madras High Court:—With the advent of our present Chief Justice commenced the period of quick disposal of criminal cases. No criminal case, as a rule, is pending for more than five months in the High Court of Madras. But execution and other miscellaneous appeals and civil revision petitions under the Small Cause Courts Act and S. 622 of the Civil Procedure Code were much neglected and were pending for a year generally and sometimes two years. This was really bad. As remarked by *Sir Barnes Peacock*, the troubles of a litigant in India begin after he obtains a decree. But within the last six months a change has come over this and the great attention devoted to the disposal of miscellaneous cases has reduced the arrears under that head very greatly and we believe that no miscellaneous case is now allowed to be pending for more than six months. Even speedy injustice is sometimes better than tardy justice. We are of course obliged to the Chief Justice for this improvement in the disposal of miscellaneous cases.

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Sittings in the Madras High Court:—We would respectfully draw the attention of the Chief Justice of Madras to the great inconvenience caused to the parties and practitioners by the arrangements made by His Lordship as regards the sittings of the Judges. In Calcutta and Bombay, the sittings are arranged for whole months, so that all interested

are in a position to form an approximate idea as to what kind of business will be taken up by the Court and when particular cases are likely to be reached. In Madras, however, it is next to impossible to know except late on the previous evening when a case is likely to come on. The sittings are arranged only for a week and they are frequently modified from day to day during the course of the week itself. This entails great difficulty in the preparation of cases; for one has to be ready in a very large number of cases at the same time in the expectation of any one of them being taken up the next sitting. As this is extremely difficult, the parties have necessarily to suffer by the insufficiency of the preparation. Again cases come on for hearing at such short notice that practitioners are not able to avail themselves of the instructions of their clients who have to be telegraphed for from long distances, and parties whose places of residence are at considerable distance from the railway station or have to perform several days' journey before reaching the Presidency town, are not in a position to give instructions to their lawyers. There is another source of inconvenience which adds heavily to the expense of the parties in the frequent changes in the sittings and the nature of the work allotted. Let us suppose a regular appeal posted before a Bench is not reached on the date for which it is posted. It may be that that Bench does not sit again for a week or a fortnight, or it does not do regular appeals. Then the party has to go back to his place and return against the day when it is posted again. Now it may be that the case gets lower down in the list, earlier cases having been got ready in the meantime. It is the experience of almost every practitioner in Madras that in the more important cases a client has to perform his journey to Madras from half a dozen to nearly a dozen times before the case is actually heard. The Chief Justice has set his face strongly against the practitioner handing over a part-heard case or a case that has come back after the return of the findings called for, and the Chief Justice is generally averse to passing over cases for the convenience of a practitioner engaged in another court. But the difficulty of handing over a case which you learn to be posted only the previous night, especially if the records happen to be bulky, is almost insuperable. If he were only able to realize a tithe of the difficulties felt by the parties and practitioners, we feel sure he would be inclined to apply the remedy. Things were not so bad some years ago even during the time of the present Chief Justice. It may be that the work on the Original Side causes a certain amount of dislocation in the arrangements, but any difficulties arising from it can be easily surmounted. We understand that representations were made to the Registrar to bring the inconvenience to the notice of

the Chief Justice. Much of the incovenience felt by the public is shared by the office itself in getting ready cases of one class or another at a moment's notice. We can easily suggest an arrangement of the sittings which will meet all the difficulties and will be welcomed by everybody concerned. The sittings should be issued for 2 or 3 months at the same time. Taking the present number of judges, when three appellate Benches sit, one Bench may do only regular appeals week after week, another second appeals in the same manner, and a third Original Side appeals, City Civil Court appeals, criminal cases and miscellaneous cases. This arrangement may be modified on Mondays when the third Bench may be split and one of the judges sit in the Insolvency Court and do the settlement of issues and other admission work on the appellate side. When there is a sufficient amount of work on the Original Side to occupy two judges for a fortnight or a month, there need only be two Benches on the appellate side, the second of which may do first appeals one week and second appeals next week. When two judges are sitting on the Original Side, no original side appeals need be taken by the appellate benches. The important thing is that the sittings should be long and continuous. Everybody will have sufficient notice of the nature and amount of the work and can adjust his other arrangements to suit the sittings previously arranged. We would strongly impress upon the Chief Justice the desirability of clearing of the present confusion, in the interests of all concerned. We cannot doubt that if the other Judges be at all consulted by his Lordship, their opinion will decidedly be in favour of our suggestion. The whole body of mofussil clients will vote to a man in favour of it. And the office will only be too ready to fall in with it. Whose interest then can it be to uphold the present confusion?

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The Law of Railway seats:—A judgment of much interest on both sides of the water, because it constitutes a precedent in the law of railway seats, was recently delivered in London. It appears that a gentleman travelling from London to Hastings had occasion to leave the carriage at Tunbridge Wells, and took the usual precaution to reserve his seat by leaving therein his umbrella and newspapers. While he was absent another passenger seized his place and refused to vacate it until forcibly ejected. The ejected passenger brought an action against the original owner of the seat, and the latter entered a counter-claim for similar damages. The claim for damages for ejectment was dismissed and the counter-claim allowed, the court holding, in effect, that the universal mode of retaining a seat in a railway carriage is a most reasonable and convenient one. By no means the least important point in the judgment referred to is the court's assertion that a holder of a seat is privileged to use reasonable force to eject an intruder.—*The Albany Law Journal.*

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The late Sir Frank Lockwood:—The English papers are full of stories of the late Sir Frank Lockwood whose untimely demise has already been noted in these columns. The Daily Telegraph says that his first appearance in the Chancery Division occasioned much surprise to the learned judge who was presiding. "What brings you here, Mr. Lockwood?" he said. Nothing abashed by so unfamiliar a question, Sir Frank looked at the outside of his brief, and replied in a matter-of-fact way. "Three and one, my lord, merely three and one," alluding, of course, to the number of guineas marked on his brief as regards the first amount, and the smaller sum having reference to the conference fee. After successfully defending a prisoner in the Criminal Court, who had put forward a very satisfactory *alibi*, Sir Frank went for a walk in the circuit town, and during his perambulations he met the judge who had presided. Addressing him, the learned judge said: "Well, Lockwood, that was a very good *alibi*." "Yes, my lord," was the answer; "I had three offered me, and I think I selected the best." Unlike many persons whose "impromptus" require apparently a long period of incubation, Sir Frank Lockwood's genius was essentially ready to the occasion. A good sample of this faculty is afforded in connection with a case where a director of some doubtful company was being cross-examined. He was giving evidence bearing upon a rather shady history, when Sir Frank put the question to the promoting director: "Now, tell me, Sir, when did you first determine to float this company?" "Float this company?" asked the witness, with some surprise; "I don't know what you mean by 'floating' the company." "Very well, then," replied Sir Frank, "I will make my meaning perfectly clear. By floating the company I refer to the operation which almost invariably precedes the sinking of a company. Do you understand me now?" This illustration evidently impressed the witness sufficiently, and during the remainder of his evidence he was disconcerted to such a degree that he fell an easy victim to the skill of the experienced lawyer. The St. James' Gazette adds that Sir Frank was fond of telling stories against himself. "I was defending a man at York once who was accused of stealing cattle—'beasts' they call them up there. I said to a witness: 'Now, my man, you say you saw so-and-so; how far can you see a beast to know it?' 'Just as far off as I am from you,' he replied instantly, amidst roars of laughter all over the court." Once he went to a religious meeting at which Judge Waddy, a circuit friend, was speaking. Mr. Waddy thought the visitor looked cynical, and turned the tables by saying: "Now, my dear friends, Brother Lockwood will lead us in a hymn."—*The Albany Law Journal.*

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We take the liberty of extracting the following from an interesting annual address delivered by President Whitaker in the New York State *Bar Association.*

The Prevalence of the crime of Perjury.

"In closing I desire to say a few words upon what I consider the greatest existing evil in the administration of justice, the prevalency of the crime of perjury in legal proceedings, and to make one or two suggestions towards a partial remedy. The profession, I believe, generally concedes that perjury is at the present time the most prevalent and dangerous crime—and the most seldom punished. It has come to such a pass that men standing high in the community apparently think nothing of swearing falsely to pleadings in order to delay and defeat justice. Most of this false swearing to pleadings is made safe and possible by the use of that great perjury-begetting provision of our Code which allows allegations upon information and belief, and denials upon want of information or belief. But in addition to swearing falsely to affidavits and pleadings, many men have no regard at all for the sanctity of an oath administered in a court of justice. To such men the actual defeat of justice, if it be to their pecuniary benefit, is viewed with complacency, even though effected by perjury. I think it is the observation of judges and of practising lawyers that the crime of perjury is committed in some form or other in at least five out of every ten litigated cases. After talking to many lawyers and judges upon the subject, this is the lowest estimate I have received. When we consider the thousands of litigated causes that are tried in our State each year, it is simply appalling. It is an awful, but I believe a true, confession: It is a shame on our profession and a disgrace to our nineteen centuries of Christian civilization.

"Were David now alive, he might again exclaim, 'All men are liars.' The cause of the increase and prevalency of perjury is not hard to find. It arises largely from a weakening in the belief of future punishment, and an apparent certainty of freedom from present punishment. The chief test of the obligation of an oath is based upon a belief in future punishment, as is evidenced by the form of the oath and manner of its administration, as recognized by law. If, therefore, we eliminate all idea of future punishment for perjury, and inflict no present punishment, or, in other words, abolish all punishment, both here and hereafter, it is not to be wondered at that the crime will prevail, and that men will not hesitate to commit it to further their interests. For punishment is the great deterrent to crime. From the year 1830 to 1896 there have been on an average three convictions a year for perjury. And during the last two years only one conviction. The crime is increasing, and the punishment decreasing. Unless the commission of the crime of perjury be checked, the enforcement of rights or prevention of wrongs through the administration of the justice will become a farce. Can the commission of perjury be checked, and how? Most emphatically yes; by the bench and bar; by the judges directing

investigation to be made by the district attorney in all cases tried before them, when they have reason to believe perjury has been committed and can be proved. And by members of the bar simply being honest and true to their profession. If the lawyers of this State would positively discourage false swearing on the part of their own clients, and honestly endeavor to have it punished when committed by the clients of their adversary, the crime would grow suddenly less. It is the professional duty of every lawyer to do this. He owes it to himself; he owes it to his fellow-man; he owes it to his country, and he owes it to his God. In populous counties there should be a department in the office of every district attorney devoted entirely to the prosecution of the crime of perjury, where lawyers who desire to do their duty could take such cases ";—*The Albany Law Journal.*

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Attachment of a Scholarship :—The question of what forms of property may be taken in execution of a judgment has been presented in a new form in the recent case of *Cleveland National Bank* v. *Morrow*, 42 S. W. Rep. 200 (Tenn). A perpetual scholarship had been conferred upon the defendant by vote of the corporation of a college. The defendant had been a benefactor of the college and in acknowledgment of his favors, the college gave him the right to keep one scholar appointed by him at the institution to enjoy gratuitously all its advantages. This scholarship was attached under a decree in equity, and sold by a master in chancery for the benefit of the creditors of the defendant; and the question arises whether this attachment should have been permitted. No direct authority, strangely enough, is to be found upon the point. The question, however, is important, and may have a wide application; for if the attachment is to be allowed in this case, similar rights as for instance, the right to appoint a patient to a free bed in a hospital, would also become subject to transfer in this summary manner

The Supreme Court of Tennessee decided that the attachment in question was improper and principle and policy support this view. What cannot be assigned, obviously cannot be taken in execution; and no right dependent upon the personal character of the holder can be assigned. For this reason a power of appointment to charitable uses under a will cannot be assigned; for its exercise demands an effort of judgment on the part of one particular person. *Doyley* v. *Attorney-General*, 4 Vin. Abr. 435. In applying the principle to the present case it is unnecessary to decide the exact nature of the college's liability. Whether the obligation be looked upon as a binding agreement on the part of the college, a revocable offer, or a gratuitous promise, the right or privilege conferred is in any case inseparably joined with the personal characteristics of the person intended to make use of it. So long as it lives in him he can no more transfer it to another than he can transfer his own mind. The college conferred the power upon him in reliance

upon his personal judgment in making the appointment. No proposal was made for taking a scholar not designated by this one particular person; and gross injustice might be done if the college were forced to accept the choice of another person who may have nothing to recommend his judgment apart from the fact that he is a creditor of him who was first intended to exercise the power. The conclusion is inevitable, that the privilege of appointment under this scholarship is a personal matter, not assignable, and hence not properly subject to attachment;—*Harvard Law Review.*

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Torts—Allurements to Children.—A waterworks company maintained upon its grounds a reservoir of water, attractive to small boys, who, to its knowledge, and without objection on its part, were accustomed to resort there. *Held,* that if the company took no reasonable precautions to prevent accidents, and one of the children, without negligence on his part, fell in and was drowned, the representatives of the deceased might recover damages from the company for his death. *Price* v. *Atchison Water Co.*, 50 Pac. Rep. 450 (Kan).

The court shows a tendency to take the untenable position that a failure to object to the entry of the boys on the land was equivalent to an express permission to them to come, but in general the opinion follows the line of argument in the Turntable cases, laying down a special rule for infant trespassers. *Keffe* v. *Mil & St. P. R. R. Co.*, 21 Minn. 207. In the majority of cases where the cause of injury has been a reservoir of water, as above, an opposite conclusion has been reached, some of these decisions being in jurisdictions which allow recovery in the Turntable cases. *Peters* v. *Bowman,* 115 Cal., 345. There would seem, however, to be no distinction on principle between the two classes of cases. In the principal case the deceased had been repeatedly warned of the danger, and was apparently of such an age as to understand that it was wrong for him to go on the defendant's land; this would place him in the position of an adult trespasser and would justify a different result:—*Harvard Law Review.*

REVIEWS.

The Indian Penal Code, by R. A. Nelson, Bar.-at-Law, Second Edition, published by Messrs. Srinivasa Varadachari & Co., Madras:—Price Rs. 8. We have received a copy of the second edition of Mr. Nelson's book on the Indian Penal Code. The author has made considerable additions to the first edition and the notes have been brought up to date. The book is likely to be

found useful by students preparing for the law examinations. Mr. Mayne's Commentaries undoubtedly hold the first place among all the works on the Indian Penal Code, and we can recommend Mr. Nelson's book as a carefully prepared analysis of the sections and of Mr. Mayne's commentaries.

The Elements of Mercantile Law, by T. N. Stevens, Second Edition, (1897), published by *Butterworth & Co., 7, Fleet Street, London*:—Price 10-6. This is an elementary book upon the branches of law which are usually dealt with under the head of Mercantile Law. The book is not intended to replace any of the established text-books upon the Law of Contracts in general, like those of Pollock and Anson, or any of the special treatises dealing with particular kinds of contracts. The book is well fitted to serve as an introduction to the larger treatises upon the various subjects of Mercantile Law. The leading principles of the subjects are presented within a very small compass in a clear and simple style. Part I of the book gives a general view of the Law of Contracts and Part II, of Sale of Goods, Agency, Negotiable Instruments, Partnership, Insurance, Carriage, Suretyship and Guarantee, and Shipping and Bankruptcy. There are portions of the book which admit of some improvement. In giving the essentials of a contract, the author states that a proposal and an acceptance are necessary to every contract. This view is no doubt adopted in the Indian Contract Act, but as pointed out by Sir Frederick Pollock, there are several cases where this analysis can be said to be applicable only by recourse to fiction. The distinction between void and voidable contracts is not pointed out; and it is rather a serious omission. But it is perhaps too much to expect anything like a complete view in such an elementary work.

The Judicial Trustees' Act of 1896 *with notes*, by Gerald John Wheeler, M.A., LL.B., published by *Butterworth & Co., 7, Fleet Street, London*:—Price S. 10. The Judicial Trustees' Act of 1896, proceeds mainly on the lines of the Scottish Act by which judicial factors are appointed. Mr. Wheeler has done a very useful and timely service to the profession in publishing the Judicial Trustees' Act with notes including notes of the cases decided in Scotland under the corresponding Act. The author has also given notes on the appointment of, and the duties attached to, the office of Public Trustee in the Colonies. We have pleasure in recommending the book to the profession.